

Judge Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID MENDOZA,

Defendant.

NO. CR06-466Z

MOTION FOR MATERIAL  
WITNESS ARREST WARRANT  
AND FOR RULE 15  
DEPOSITION

Comes now the United States of America, by and through Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and Susan M. Roe, Assistant United States Attorney, respectfully requests that this Court issue a warrant under Title 18, United States Code, Section 3144, for Timothy P. Smith as a material witness in a prosecution of the above-entitled defendant, David Mendoza, until such time that the witness's testimony can be secured for trial or until such time that his deposition can be taken pursuant to the Rule 15 of the Federal Rules of Criminal Procedure.

Timothy P. Smith, an Australian citizen, was arrested, entered a guilty plea and was sentenced for his role in importing and distributing marijuana in this district. His plea agreement and the sentencing recommendations were filed under seal, although the Judgment is open. Mr. Smith was a witness before the Grand Jury. The government asserts, based on Mr. Smith's Grand Jury testimony, that he has relevant testimony in the case *United States v. David Mendoza*, CR06-466. The government will submit a copy of

1 his Grand Jury testimony under seal. Since Mr. Smith's Grand Jury testimony, two events  
2 have occurred.

3 (1) David Mendoza has been indicted and local counsel has contacted the  
4 government on his behalf. Mr. Mendoza is a fugitive and, although the government has  
5 engaged in discussions with defense counsel and was hopeful that Mr. Mendoza would  
6 return to the United States to face his indictment, he remains a fugitive in Spain. Within  
7 the past week defense counsel submitted a Claim in a related forfeiture proceedings  
8 which Mr. Mendoza signed and had notarized in Bilbao, Spain, on April 2, 2007.

9 (2) The government just learned that Mr. Smith has agreed to deportation and that  
10 an Order of Deportation is being presented to a Court this week. The Bureau of  
11 Immigration and Customs Enforcement is ready to return him to Australia but, by this  
12 pleading, the government moves to detain him for a short time, so that he may be deposed  
13 prior to his departure. Mr. Mendoza's attorneys would be involved in this deposition and  
14 Mr. Smith could be deported once the deposition was concluded.

15 The Court has the authority under 18 U.S.C. § 3144 to detain an individual as a  
16 material witness in any criminal proceeding. Title 18, United States Code, Section 3144,  
17 provides that:

18 If it appears from an affidavit filed by a party that the  
19 testimony of a person is material in a criminal proceeding, and  
20 if it is shown that it may become impracticable to secure the  
21 presence of the person by subpoena, a judicial officer may  
22 order the arrest of the person and treat the person in  
23 accordance with the provisions of Section 3142. . . .

22 18 U.S.C. § 3144. Before a material witness arrest warrant may issue, the Court must  
23 have probable cause to believe (1) the testimony of the person is material and (2) it may  
24 become impracticable to secure his presence by subpoena. *Bacon v. United States*,  
25 449 F.2d 933, 943 (9th Cir. 1971). Mr. Smith's Grand Jury testimony provides the basis  
26 for believing that he has material testimony. The government also has probable cause to  
27 believe that the normal subpoena process may not secure the appearances of this witness  
28 after he is deported, as he will not be subject to compulsory process once he is in

1 Australia.

2 The United States requests that the Court detain this witness until the United States  
3 has expeditiously obtained his testimony. The United States will proceed in good faith  
4 and with due diligence and has contacted Gilbert Levy, counsel for Mr. Smith, and  
5 Amanda Lee, counsel for Mr. Mendoza, in an attempt to schedule the deposition quickly.

6 DATED this 17th day of April, 2007.

7 Respectfully submitted,

8 JEFFREY C. SULLIVAN  
9 United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

s/Lilibeth D. Margen  
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